



January 14, 2010

VIA ECFS

Ms. Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Suite TW-A325  
Washington, DC 20554

**Re: GN Docket No. 09-191, WC Docket No. 07-52; In the Matters of Preserving  
the Open Internet, Broadband Industry Practices; Comments to NPRM  
released October 22, 2009**

Dear Ms. Dortch:

Please find attached comments to the Notice of Proposed Rulemaking issued in the above referenced proceedings, filed today at the Commission. A copy has been filed in each proceeding, as instructed. Electronic copies have also been provided via email to the Competition Policy Division and Best Copy and Printing.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew Tennis", written in a cursive style.

Matthew Tennis  
Counsel

Cc: Competition Policy Division via email (cpdcopies@fcc.gov) (1)  
Best Copy and Printing, Inc. via email (fcc@bcpiweb.com) (1)

**FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C.**

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| In the Matter of                    | ) |                             |
|                                     | ) |                             |
| <b>Preserving the Open Internet</b> | ) | <b>GN Docket No. 09-191</b> |
|                                     | ) |                             |
| <b>Broadband Industry Practices</b> | ) | <b>WC Docket No. 07-52</b>  |

**COMMENTS OF RNK INC. D/B/A RNK COMMUNICATIONS**

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Dated: January 14, 2010

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**COMMENTS OF RNK INC. D/B/A RNK COMMUNICATIONS**

In response to the Federal Communications Commission (“Commission” or “FCC”) Notice of Proposed Rulemaking issued in the above-captioned proceeding,<sup>1</sup> RNK, Inc. d/b/a RNK Communications (“RNK”), hereby respectfully submits the following comments.

**I. INTRODUCTION & SUMMARY**

RNK, a small, privately-held company, based in Dedham, Massachusetts, and founded in 1992, has grown from its initial niche of local resale and prepaid long distance calling cards to an Integrated Communications Provider, marketing local and interexchange telecommunications services, as well as Internet services and IP-enabled services.

RNK and/or its affiliates are certified facilities-based Competitive Local Exchange Carriers (“CLECs”) and/or interexchange carriers in Connecticut, the District of Columbia, Florida, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island and Virginia that offer wholesale and retail residential and business telecommunications services, interconnected VoIP services and content services. In addition, RNK has authority to resell certain forms of telecommunications in Maine, Texas and Vermont, as well as international §214 authority from the Commission. Via its own facilities, RNK serves

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<sup>1</sup> In the Matter of Preserving the Open Internet, Broadband Industry Practices, GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, FCC 09-93 (rel. Oct. 22, 2009) (*NPRM*).

a variety of customers with a broad range of telecommunications and non-telecommunications services. RNK also offers Internet application products and subscription based services both to retail customers as well as via independent resellers on a wholesale basis, and is a “content, applications, and services” provider as described in the *NPRM*<sup>2</sup> with regard to these product lines.

RNK agrees that the Commission should adopt a clear set of regulations promoting an open Internet, and supports the six rules proposed in the *NPRM*. The principles are necessary to achieve the stated goals of the Commission in this proceeding, to promote investment and innovation in the Internet, competition, facilitate speech and civic participation, and address practical considerations necessary for the efficient operation of networks.<sup>3</sup> The nondiscrimination rule proposed is necessary to ensure lawful content is not restricted from the open Internet and to preserve the free flow of information between subscribers and content providers. Making this rule subject to reasonable network management will ensure that providers can adapt to new technologies and maintain control over the efficiency of their networks. RNK also supports the Commission’s proposal requiring network management transparency. In order to avoid the possibility that content discrimination could be disguised as network management, transparency is needed between network providers and the public to ensure that management practices are kept in check and do not become unreasonably discriminatory. Finally, it is RNK’s position that these proposed rules do not represent a violation of network providers’ First Amendment rights by forcing them to carry certain content; this mischaracterizes the issue, which is the Commission’s attempt to prevent network providers from controlling their subscribers’ access to content. To find otherwise would be to allow

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<sup>2</sup> *NPRM* at ¶4, ¶8, ¶16.

<sup>3</sup> *Id.* at ¶61.

network providers to discriminate content at will, which would represent a suppression of subscriber and content providers' speech, and severely undermine the free flow of information that is the cornerstone of the open Internet.

## **II. THE COMMISSION SHOULD CODIFY THE SIX INTERNET PRINCIPLES**

RNK agrees with the Commission that the preservation and promotion of the open Internet depends upon competition among network providers, and content, application, and service providers.<sup>4</sup> RNK believes that the Commission must take decisive action prevent discriminatory practices that may materialize in the absence of rules insuring a free and open internet. Accordingly, RNK supports the Commission's draft language codifying the four principles announced in the *Internet Policy Statement*,<sup>5</sup> the fifth principle of nondiscrimination and the sixth principle of transparency,<sup>6</sup> as a means to safeguard and promote the open Internet. Consumers should be entitled to access and use, free from discriminatory and arbitrary practices, the lawful Internet content of their choice. Similarly, the decision as to which applications to run or services to use, provided all are subject to the needs of law enforcement and reasonable network management should rest with the consumer, not the broadband Internet access provider (or "ISP").<sup>7</sup> Consumers should also be entitled to connect their choice devices, which are legal and non-harmful to the network.<sup>8</sup>

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<sup>4</sup> *Id.* at ¶5.

<sup>5</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Policy Statement, 20 FCC Rcd 14986, 14987–88, ¶4 (2005) (*Internet Policy Statement*).

<sup>6</sup> *NPRM* at ¶16.

<sup>7</sup> *Id.* at ¶5.

<sup>8</sup> *Id.*; RNK notes that the Commission has acted under analogous circumstances to prevent providers from unreasonably restricting third-party attachments to a network where there was not harm to the network. *see* *Hush-A-Phone Corp. v. U.S.*, 238 F.2d 266, 269 (D.C. Cir. 1956) (holding that third party device could be attached to

**a. A GENERAL PROHIBITION AGAINST DISCRIMINATION IS NECESSARY TO PROMOTE COMPETITION**

We agree with the Commission that the “ability of network operators to discriminate in price or service quality among different types of traffic or different providers or users may impose significant social costs, particularly if the discrimination is motivated by anticompetitive purposes.”<sup>9</sup> However, RNK also understands that broadband Internet access service providers also need the ability to adapt new technologies and business models to a rapidly evolving online landscape, and manage their networks accordingly.<sup>10</sup> As the Commission astutely observes, the crux of the issue is the balance between socially beneficial and socially harmful discriminatory practices.<sup>11</sup>

RNK supports the general rule proposed by the Commission prohibiting ISPs from discriminating against, or in favor of, any content, application, or service, subject to reasonable network management, which reads as follows: “Subject to reasonable network management, a provider of broadband Internet access service must treat lawful content, applications, and services in a nondiscriminatory manner.”<sup>12</sup> The proposed rule will promote competition among content providers while allowing the ISPs the flexibility to monitor and prioritize their networks as long as such network management practices are reasonable. The Commission has also proposed rules allowing for the needs of law enforcement and national security.<sup>13</sup>

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phone as it did not harm the facilities of provider); In the Matter of Use of the Carterphone Device in Message Toll Telephone Service, Thomas F. Carter and Carter Electronics Corp. v. American Telephone and Telegraph Co., Docket No. 16942, Docket No. 17073, FCC 68-661, (rel. June 26, 1968) (Commission holding that device could be connected to network as long as it did not harm the system).

<sup>9</sup> *NPRM* at ¶103.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at ¶104.

<sup>13</sup> *See id.* at ¶142-43, recognizing the long standing policy of permitting law enforcement appropriate access to communications networks, the Commission proposes that nothing in these rules would either supersede, or limit the ability, of an ISP to address the needs of law enforcement consistent with applicable law; the Commission proposes a similar rule for emergency communications access and to address the needs of public safety or national or homeland security authorities. *See id.* ¶145-46.

A general prohibition against discrimination is necessary as the ISPs have engaged in activity which has swung this balance in the direction of competitive and social harm.<sup>14</sup> As network gatekeepers, the ISP's have at times exercised their power by censoring content on their networks, leading to public controversy.<sup>15</sup> As the Commission has observed, ISP's "have an incentive to use this gatekeeper role to make it more difficult or expensive for end users to access services competing with those offered by the network operator or its affiliates."<sup>16</sup> At least one market leading ISP has apparently already engaged in selective content blocking,<sup>17</sup> though the technology needed to monitor the minutiae of file transfers or content applications on any given network and block the same is readily available to today's ISPs.<sup>18</sup> Numerous industry experts have cited the actions of Comcast in blocking certain peer-to-peer applications from its network as examples of current unacceptable network management practices.<sup>19</sup>

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<sup>14</sup> Prompted by complaints from the industry and public regarding Comcast's network management practices, the Commission, after incorporating these matters into its *Broadband Industry Practices* proceeding, determined that Comcast's practices were "invasive and outright discriminatory," and further held that "Comcast's conduct poses a substantial threat to both the open character and efficient operation of the Internet, and is not reasonable." See In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications, Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management", Memorandum Opinion and Order, File No. EB-08-IH-1518, WC Docket No. 07-52, FCC 08-183 (rel. August 20, 2008) at ¶42, 51 (*Comcast Order*); see also Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management" (filed Nov. 1, 2007), available at [http://www.fcc.gov/broadband\\_network\\_management/fp\\_et\\_al\\_nn\\_declaratory\\_ruling.pdf](http://www.fcc.gov/broadband_network_management/fp_et_al_nn_declaratory_ruling.pdf); see also Petition of Vuze, Inc. to Establish Rules Governing Network Management Practices by Broadband Network Operators (filed Nov. 14, 2007), available at [http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native\\_or\\_pdf=pdf&id\\_document=6519811711](http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519811711) at 11-12, n14 (Examples of other ISPs blocking "undesirable" content, such as Verizon's refusal to allow opt-in text messages from a large pro-choice advocacy group; Verizon Wireless, T-Mobile, and Alltel denying a VoIP company access to their wireless networks; and AT&T allegedly censoring comments critical of President Bush during a webcast of a concert by Pearl Jam)(*Vuze Petition*).

<sup>15</sup> See Adam Liptak, *Verizon Rejects Text Messages From An Abortion Rights Group*, N.Y. Times, Sep. 27, 2007, at A1; Adam Liptak, *In Reversal, Verizon Says It Will Allow Group's Texts*, N.Y. Times, Sep. 28, 2007, at A20. See also Ryan Blethen, *Add Internet Freedom to Pearl Jam's Greatest Hits*, Seattle Times, Aug. 17, 2007, at B6; John Nichols, *Censored Show Proves AT&T's Bad Faith*, Capital Times (Madison, WI), Aug. 16, 2007, at A8.

<sup>16</sup> *NPRM* at ¶72.

<sup>17</sup> *Comcast Order* at ¶41.

<sup>18</sup> *NPRM* at ¶57 (noting the level of detail ISPs may monitor, direct, inspect, and block network transmissions).

<sup>19</sup> *Comcast Order* at ¶46 (expert testimony questioning whether Comcast's practices fell "within the realm of network management at all, much less reasonable network management," that "[n]either Deep Packet Inspection nor

Furthermore, the nondiscrimination rule proposed by the Commission allows exceptions for reasonable network management (such as blocking of illegal content, or taking steps to address harmful network congestion), and the rules also allow for exceptions for law enforcement, and other national security measures.<sup>20</sup> Under the proposed rules ISPs maintain the ability to police their networks, without the right to determine for their subscribers which lawful content their subscribers will have access to.

While ISPs have objected to previous attempts to impose net neutrality regulations as unnecessary, and in fact have argued that such policies would restrict network development and stifle innovation,<sup>21</sup> it is apparent that in at least one case that when left to their own devices, Internet Service Providers will not self regulate in a consumer friendly fashion.<sup>22</sup> In fact, these self regulatory practices have been described by some industry experts as possible instances of consumer fraud.<sup>23</sup> This suggests that the self-correcting market mechanisms the ISPs want to rely upon are not the most beneficial to the public,<sup>24</sup> and instead, that self regulation will only serve the ISPs and discourage innovation and the growth of the Internet.

For these reasons a strong prohibition against content discrimination is necessary to ensure ISPs do not abuse their positions as network gatekeepers to force ISP approved content upon their subscribers. By preventing content discrimination, and prohibiting ISP created barriers between consumers and applications providers, the rules can fulfill the goal of promoting competition and preventing the effects of possible anticompetitive practices.

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RST Injection” – methods Comcast uses to manage its network – “are acceptable behavior,” and that by using such methods, Comcast was “imposing a value judgment on the consumer, and that is, in the end, looking at your customer and saying ‘enemy.’”).

<sup>20</sup> *NPRM* at ¶142-46.

<sup>21</sup> *Id.* at ¶60, ¶65.

<sup>22</sup> *Comcast Order* at ¶41.

<sup>23</sup> *Id.* at ¶46.

<sup>24</sup> *NPRM* at ¶78 (opponents to increased net neutrality regulation cite that a “firestorm of controversy . . . would erupt if a major network owner embarked on a systematic campaign of censorship on its network,” making self regulation in the best interest of the ISP and formal policies unnecessary). *See* n186.

**b. TRANSPARENCY IS NECESSARY TO ENSURE PROPER NETWORK MANAGEMENT**

We agree with the Commission that a rule requiring ISPs to disclose their network management practices to consumers is critical to safeguarding and promoting the open Internet. As the Commission eloquently notes, “sunlight is the best disinfectant,” and the Commission must strive to maintain transparency of ISPs relevant network management practices to consumers to “discourage[] inefficient and socially harmful market behavior.”<sup>25</sup> Therefore, RNK supports the Commission’s rule in its proposed form:

Subject to reasonable network management, a provider of broadband Internet access service must disclose such information concerning network management and other practices as is reasonably required for users and content, application, and service providers to enjoy the protections specified in this part.<sup>26</sup>

The transparency rule will help prevent discriminatory practices from masquerading as network management. As evident in the *Comcast Order*, ISPs have previously attempted to discriminate content on these grounds.<sup>27</sup> Comcast has characterized the intentional selection and disruption of its subscribers’ peer-to-peer connections as reasonable network management, necessary to ease congestion on its network.<sup>28</sup> Upon inspection of its methods, however, the Commission determined that Comcast’s motivations were in blocking a disfavored application, rather than managing bandwidth on its network.<sup>29</sup> As the *Comcast Order* demonstrates, “reasonable network management” remains a grey area that could be exploited to justify

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<sup>25</sup> *NPRM* at ¶118.

<sup>26</sup> *Id.* at ¶119.

<sup>27</sup> *Comcast Order* at ¶44 (arguing that it is not discriminating peer-to-peer traffic because it is not blocking traffic, only degrading it); and see ¶45 (asserting that even if its practice is discriminatory, it qualifies as reasonable network management).

<sup>28</sup> *Id.* at ¶47.

<sup>29</sup> *Id.* at ¶48 (In determining that Comcast’s content discrimination practices were not reasonable network management, the Commission held that its means were not carefully tailored to its interest in easing network congestion, as its practice could affect customers who were using little bandwidth simply because they were using the disfavored application, it was not deployed only during times of the day when congestion was prevalent, and its equipment costs did not appear to target only those neighborhoods that had congested nodes).

discrimination against content and application providers. Effective adjudication of these matters on a case-by-case basis will require a robust transparency policy to ensure the ISPs are tasked to explain and justify their network management practices to prevent the sort of activity Comcast was engaging in.

Network management practices must also be adequately disclosed at the consumer level. In an attempt to preserve the regulatory status quo, and vaunt the efficacy of self regulation, the ISPs have argued that any campaign of content censorship on their part would be met with swift industry and public rebuke;<sup>30</sup> thus the marketplace effectively polices the ISPs. The public must be well informed if it is to be tasked with uncovering and policing any would-be content discriminating behavior of the ISPs. Requiring disclosure to consumers will also serve to increase competition in the marketplace, as increased transparency will lend itself to increased content and application access.

Fear of public outcry has not prevented several ISPs from engaging in discriminatory network management<sup>31</sup>, which would indicate the current level of disclosure required of the ISPs, in some cases, is insufficient. Therefore network management transparency, by the ISPs own reasoning, can only improve self regulation of network practices.

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<sup>30</sup> Notwithstanding these argument posed by ISPs, many larger ISPs bundle their services with other services (e.g., voice, internet and video) in long-term contracts. It is only after entering into these contracts that the customer may learn about the ISP's "management" practices. However, by this time the customer may face large early termination fees and the associated inconveniences of changing providers (e.g., potentially increased rates, loss of email addresses, etc...). See also *NPRM* at ¶78.

<sup>31</sup> See *Comcast Order* at ¶41; *Vuze Petition* at n13-17.

### III. THE PROPOSED RULES DO NOT VIOLATE THE FIRST AMENDMENT RIGHTS OF THE ISPS

The Commission has inquired as to whether the proposed nondiscrimination rule imposes any burdens on ISPs' speech that would be cognizable for purposes of the First Amendment.<sup>32</sup> While net neutrality has been championed as a First Amendment cause for consumers and content providers,<sup>33</sup> there has also been discussion of possible violations of ISPs First Amendment rights with regard to supposed "forced speech."<sup>34</sup>

The forced speech issue represents a mischaracterization of the effect of the proposed nondiscrimination rule. As indicated in the *McSarrow Speech*, there is at least some concern on the ISP side that a prohibition against application discrimination is akin to forcing the ISPs to carry content, or speech, on their networks against their will. As the proposed nondiscrimination rule would have the affect of restricting the ISPs exercise of free speech, it represents a potential violation of the ISPs First Amendment rights. To accept this argument, however, we would need to isolate the supposed resultant act – forced content on ISP networks – from the activities which helped fuel the need for this regulation in the first place.

These rules were designed to promote investment and innovation in the Internet, competition, facilitate speech and civic participation, and address practical considerations necessary for the efficient operation of networks.<sup>35</sup> They were partly in response to complaints that ISPs were engaging in practices of discriminating content on their networks. The ISPs have

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<sup>32</sup> NPRM at ¶116.

<sup>33</sup> *Id.* at ¶75-77 (Proponents for net neutrality argue the Commission should take steps to preserve the Internet "as a general purpose technology that supports wide open speech.") See Letter from Marvin Ammori, General Counsel, Free Press, to Marlene H. Dortch, Secretary, FCC, WC Docket 07-52, at 11 (filed June 12, 2008); see also, e.g., ACLU Apr. 7, 2008 Comments, WC Docket No. 07-52, WT Docket No. 08-7; Media Access Project June 8, 2008 Comments, GN Docket No. 09-51.

<sup>34</sup> Speech of Kyle McSarrow, *Net Neutrality: First Amendment Rhetoric in Search of the Constitution*, December 9, 2009, available at <http://www.ncta.com/PublicationType/Speech/Net-Neutrality-First-Amendment-Rhetoric-in-Search-of-the-Constitution.aspx> (*McSarrow Speech*).

<sup>35</sup> NPRM at ¶61.

traditionally served as conduits to provide Internet access to their customers. Technological advances have allowed scrutiny of their networks on the packet level, giving ISPs complete gatekeeper control of their networks. It is this ability to block content at the packet transmission level that requires rules to prevent abuses of this power. We have already seen examples of how ISPs can abuse their positions to block content they object to. These rules are not “forcing” the ISPs from doing anything more than to refrain from practicing discrimination. The open Internet includes many ideas and aspirations, including encouraging the free flow of information, democratic ideals, innovation, education, and access, and an act of ISP censorship of lawful content is diametrically opposed to these ideals. To accept the “forced speech” argument would allow the ISPs to censor content, and place barriers between subscribers and content providers obstructing the free flow of information that is at the heart of the concept of the open Internet.

If the inability to block content were found to be a violation of the ISPs First Amendment rights, then the ISPs should be able to exclude any content they wish from their networks, including any and all content/applications which pose a competitive threat. As a conduit, ISPs have total control over the medium, and they have the power to obstruct access to the content of their choice. In geographic areas where single to few ISPs dominate the market, this may give subscribers little option to access content with another provider. The First Amendment does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.

#### **IV. CONCLUSION**

In conclusion, RNK agrees that the Commission should adopt a clear set of regulations prohibiting restrictions on subscriber’s access to lawful content; prohibiting restrictions on their use of the applications and services of their choice, subject to necessary law enforcement; to

connect their choice of legal devices that do not harm the network; to promote competition between ISPs, and application and service providers; prohibiting discrimination against lawful content; and providing transparency of ISPs network management practices. These rules are necessary to achieve the Commissions goals to promote investment and innovation in the Internet, competition, facilitate speech and civic participation, and address practical considerations necessary for the efficient operation of networks.

Furthermore, these proposals do not violate ISPs First Amendment rights by forcing them to carry speech on their networks. These rules represent in part the Commission's attempt to prevent network providers from controlling their subscriber's access to content. If ISPs were allowed to discriminate content at will, it would be at the expense of subscriber and content providers' speech, and severely undermine the free flow of information on the open Internet.

Respectfully submitted, by the undersigned,



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DATED: January 14, 2010